DATUK ABDUL AZIZ AHMAD *a*

v.

UDA HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[ORIGINATING SUMMONS: S2-24-831-1997]
7 JULY 1998

CONTRACT: *Building contract - Anticipatory breach - Agreement to develop housing project on profit sharing basis - Abandonment of project - Claim for specific performance - Whether there was substitution of contract by subsequent agreement - Construction of terms of contract - Application of good commercial sense principle* *c*

In 1986, the plaintiff, the owner of 22.7 acres of land in Kajang ('the said land'), entered into a joint venture agreement ('the JVA') with the defendant. The main terms of the JVA were that the plaintiff was to transfer ownership of the said land to the defendant. In return the defendant would develop the said land into a housing project ('the project') on a profit sharing basis in the ratio of 27% to the plaintiff and 73% to the defendant. *d*

Pursuant to the terms of the JVA, an upfront sum of RM3 million was paid to the plaintiff by the defendant as part of the profit. The plaintiff was to pay the defendant interest on the said upfront payment, and the said upfront payment, together with the accumulated interest thereon, was to be deducted finally from the profits to be ascertained upon completion of the project. *e* *f*

In 1989, the defendant, by way of a letter to the plaintiff, informed the plaintiff that the project was no longer viable and decided to abandon the project. The defendant further proposed that the plaintiff re-purchase the said land from the defendant on the following terms: (a) that the plaintiff was to refund the upfront payment together with the accumulated interest and all other monies advanced by the defendant for the project within a period of six months; (b) that the defendant would retransfer the said land to the plaintiff; and (c) in the event the plaintiff failed to refund within the stipulated time, the defendant would take over the said land and the plaintiff would not have any claim over the said land. *g* *h*

Subsequently by way of another letter, the defendant agreed to waive the interest. The plaintiff signed this second letter accepting the terms and conditions thereof. The plaintiff, however, failed to refund to the defendant and the defendant informed the plaintiff that they intended to take over the said land. The plaintiff subsequently filed the present action seeking an order *i*

for specific performance of the JVA and in the alternative for damages. The main issue before the court was whether the JVA had been terminated and substituted by another subsequent agreement.

Held:

[1] On the facts, the defendant was the party that had breached the JVA. The plaintiff was entitled, upon this breach by the defendant, to treat the JVA as terminated even though the plaintiff had not elected to do so.

[2] The submission of the plaintiff that the defendant had, via the subsequent letters, given him an option to purchase the said land within the stipulated time should fail. The third condition in the said letters stipulated that should the plaintiff failed to refund the monies within the stipulated period, the defendant would take over the said land. Such a term cannot be stipulated in an option.

[3] In ascertaining the intention of the parties as regards the subsequent letters, the court should take into account the surrounding circumstances. A court must not merely construe the words of a contract embodied in a document. It must be concerned with the facts and circumstances which, when taken together, point to the intention of the parties in relation to the effect that was meant to be given by them to a particular transaction. The law will always look beyond the terminology of the document to the actual facts of the situation and that it is no longer a question of words but substance to arrive at a just result.

[4] Applying the good commercial sense principle set out in *Seet Chuan Seng's* case, it made no commercial sense for the plaintiff, who owned 22.7 acres of land and who had the defendant at his feet, to want to surrender his rights over the said land and submit and expose himself to liability by putting his signature on the subsequent letters. Commercial sense and high authority would bind the court to hold that the plaintiff could not have so intended.

[5] On the facts, the JVA must be held to be still subsisting. But, since specific performance would seem futile in the light of the defendant's own admission of the non-viability of the project, the plaintiff ought to be awarded damages to be assessed by the Deputy Registrar.

[Judgment for plaintiff.]

Case(s) referred to:

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(refd)***
Finmark Consultants Pte Ltd v. Development & Commercial Bank Bhd [1994] 3 CLJ 519 ***(cit)***
Mohamed v. Ho Wai [1961] 27 MLJ 7 ***(cit)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 ***(cit)***
Miramar Maritime Corp v. Holborn Trading; The Miramar [1984] AC 676 ***(refd)***
Omar Mat Ziki v. Mokhtar Amin [1996] 2 MLJ 687 ***(cit)***
Paul Murugesu Ponnusamy v. Cheok Toh Gong & Ors [1996] 2 CLJ 397 ***(cit)***
Railway Assets Corp v. Elmspark Holdings Sdn Bhd & Ors [1997] 4 CLJ 136 ***(cit)***
Seet Chuan Seng & Anor v. Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 3 CLJ 7 ***(refd)***

For the plaintiff - R Shyamala; M/s Hussein & Co
For the defendant - S Thilagavathy (Ainul Azlinda Inon Shaharuddin with her); M/s Hisham, Sobri & Kadir

Reported by Ling Hea Hoon

JUDGMENT

RK Nathan J:

Facts

The plaintiff owned 22.7 acres of land in Kajang under various titles (the land). The Ulu Langat land office approved the plaintiff's application for change of category of use of the said land from agriculture to housing subject to conditions *inter alia* that the status of the land be changed to Malay reserve in view of its location.

The plaintiff and the defendant entered into a joint venture agreement (the JVA) dated 29 April 1986. The main terms of the JVA were that the plaintiff was to transfer ownership of the said land to the defendant. In return the defendant was to develop the said land into a housing project (the property) on a profit sharing basis in the ratio of 27% to the plaintiff and 73% to the defendant respectively. As a term of the agreement the defendant paid an upfront sum of RM3 million on 16 June 1986 as part of the profit, as soon as the land was registered in the defendant's name, subject to the plaintiff paying the defendant interest at the rate of 12.5% per annum on the said upfront payment. It was also agreed that the said upfront payment with accumulated interest was to be deducted finally from the profits to be ascertained upon completion of the project. It was further agreed by the defendant that it would commence the project works as soon as the plans were approved by the relevant authorities.

It is not in dispute that the defendant decided in 1989 to abandon the project. In fact on 26 May 1989, that is, about three years after the JVA was signed the defendant wrote to the plaintiff informing him, *inter alia,* that the project, in its opinion, was no longer viable and that in the circumstances, it was unable to pay the plaintiff the agreed 27% profit out of the project and that in the circumstances it had **decided** (emphasis provided) to abandon the project.

The defendant then proposed by a letter dated 26 May 1989 that the plaintiff re-purchase the said land from the defendant on the following terms:

(1) The plaintiff to refund to the defendant the upfront payment inclusive of accumulated interest and all other monies advanced by the defendant in respect of the project, within a period of six (6) months.

(2) That the defendant was to then retransfer the said land to the plaintiff.

(3) In the event the plaintiff failed to refund within the stipulated time, the defendant was to take over the said land and the plaintiff would not have any claim over the said land.

Whilst the plaintiff admits signing the said letter as acknowledgement he denies consenting to the terms.

In any case, it is not in dispute that the plaintiff requested that the interest be waived. The defendant was agreeable and issued a fresh letter dated 27 July 1989 whereby the defendant waived the interest but demanded the payment of the upfront RM3 million together with an additional sum of RM187,151 being payment towards other disbursements. The plaintiff signed on the said letter accepting the said terms and conditions. The plaintiff was unable to refund to the defendant the sum of RM3,187,151 despite securing various extensions. By a letter dated 30 October 1990 the defendant informed the plaintiff that it was not prepared to grant any further extensions for refund of the sum of RM3,187,151 and informed the plaintiff that the agreement was terminated and that it intended to take over the said land.

On 14 October 1997 the plaintiff filed this action seeking an order for specific performance of the JVA and in the alternative for damages.

Findings Of The Court

Whether The JVA Has Been Substituted With The Subsequent Agreement?

It was an express term of the JVA that the defendant was to develop the said land as soon as possible. The defendant had failed to do so on the basis that the project was not viable. The plaintiff was only informed of this after the

defendant had on its own, decided that the project was not viable. It is in evidence that the defendant had carried out no work at all on the land up to the time the JVA was terminated by the defendant.

I find that it is totally unacceptable conduct on the part of the defendant to have failed to ensure the plans are approved and to commence work on the said land as soon as the said land was transferred to the defendant. No satisfactory explanation has been proffered by the defendant as to why no work had commenced from 29 April 1986 when the JVA was signed, to 30 October 1990 when it was terminated. The contention of the non-viability of the project is contrary to the evidence given by DW1, Mohd Jabar bin Ahmad Kembali, the manager of the defendant, who stated in examination-in-chief that the said JVA was entered into by the defendant after a thorough study of the viability of the project.

In any case, an organisation such as the defendant ought to have studied the viability of the project prior to the execution of the JVA. It is inappropriate and out of line for such an organisation to enter into a contract and then decide if it is viable or not. Clearly on this and on the admission by the defendant that it had decided to abandon the project, I find that the defendant was the party that had breached the JVA.

The plaintiff argues that he had not accepted the defendant's termination of the contract. However, whilst the plaintiff was entitled, on this breach by the defendant, to treat the agreement as terminated (see *Omar bin Mat Ziki v. Mokhtar bin Amin* [1996] 2 MLJ 687) the plaintiff, it is contended by the defence, is deemed to have entered into a new contract by accepting the terms of the letter dated 26 May 1989 and varied by letter dated 27 July 1989.

Option To Purchase

On the other hand it is the submission of the plaintiff that he was given an option to purchase the said land within the stipulated time and that should he fail to do so, he will have no rights or interest over the said land in so far as purchasing or taking over the land is concerned.

Whilst such a submission was tenable I have to reject it on the basis that the third condition stipulated and acknowledged by the plaintiff is that if the plaintiff failed to refund the said sum of RM3,187,151 within the stipulated period of six months the defendant would take over the said land. Such a term cannot be stipulated in an option.

The plaintiff has argued that there was in fact no termination of the JVA in that, by merely signing and agreeing to the terms of the letter dated 27 July 1989 the plaintiff had not agreed to the termination of the JVA.

Relying on the then Supreme Court decision in *Paul Murugesu a/l Ponnusamy sebagai wakil Nalamah a/p Sangapillay (P) (Simati) v. Cheok Toh Gong & 4 Ors* [1996] 2 CLJ 397 SC the plaintiff argued that where there was a variation of a contract, it must be shown that not only that the variation was understood by the parties but that they intended to be bound by it. In the present case the plaintiff submitted that there was no *consensus ad idem.*

I cannot by any stretch of the imagination understand why a plaintiff, who was sitting pretty and who had a watertight case for either specific performance or for damages against the defendant upon the defendant's own admitted breach, by refusing to perform the contract, would contract himself out of such a position and not only that, at the same time, to tie himself to a fresh contract, whereby he is in a worser situation.

Since the plaintiff is claiming for specific performance and since it is trite that specific performance is only available in cases of executory contracts, that is contracts that have not been performed (see *Mohamed v. Ho Wai* [1961] 27 MLJ 7) it is pertinent for this court to decide whether the JVA has indeed been terminated and thus substituted by the so-called subsequent agreement.

The facts show that the defendant had on its own, and arbitrarily, terminated the contract. The defendant then imposed upon the plaintiff what the defendant contends is a subsequent or fresh contract. In *Finmark Consultants Pte Ltd v. Development & Commercial Bank Bhd* [1994] 3 CLJ 519; [1994] 3 MLJ 192 SC the then Supreme Court held that unless and until the innocent party makes known his intention to accept such repudiation, the contract continues to exist. In the case before me, whilst there was a formal legal document to encapsulate the terms and conditions of the JVA, there was no agreement terminating the said JVA. Instead the court is asked to presume that because of the existence of the subsequent two letters dated 26 May 1989 and varied by letter dated 27 July 1989, the JVA is deemed cancelled and of no effect. The plaintiff now contends that he never properly understood the terms contained in the said two letters. It is settled law that in ascertaining the intention of the parties as regard the said two letters, I should take into account the surrounding circumstances. In *Railway Assets Corp v. Elmspark Holdings Sdn Bhd & Ors* [1997] 4 CLJ 136; [1997] 3 MLJ 224 the Court of Appeal held that to ascertain the intention of the parties a court must not merely construe the words of a contract embodied in a single document. The court must be concerned with the facts and circumstances which, when taken together, point to the intention of the parties in relation to the effect that was meant to be

given by them to a particular transaction. In fact almost similar sentiments were expressed by the then Supreme Court in *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405 SC wherein the court held that the law will always look beyond the terminology of the document to the actual facts of the situation and that it is no longer a question of words but substance. In looking for the substance and not the mere verbiage to arrive at a just result, I seek refuge in the Supreme Court decision of *Seet Chuan Seng & Anor v. Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 3 CLJ 7; [1994] 2 MLJ 770 wherein the court applied "the good commercial sense principle" as formulated by Lord Diplock in *Miramar Maritime Corp v. Holborn Trading; The Miramar* [1984] AC 676; [1984] 2 All ER 326 wherein his Lordship said at p. 685:

> My Lords, I venture to assert that no businessman who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of the actual contractual words used in the charterparty so as to give to them this effect when they are treated as incorporated in the bill of lading.

In adopting this same argument Gunn Chit Tuan CJ (Malaya) said in *Seets'* case at p. 784:

> In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl. 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Compania Naviera SA v. Salen Rederierna AB* ([1985] AC 191; [1984] 3 All ER 229; [1984] 3 WLR 592):
>
> > ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

Therefore I cannot see why the plaintiff, who owned 22.7 acres of land and who had the defendant at his feet would want to, by putting his signature to a copy of both the relevant letters dated 26 May 1989 and 27 July 1989, surrender his rights over the said land and meekly submit and expose himself to liability. Commercial sense and high authority bind me to hold that the plaintiff could not have so intended.

It would have been a fairer deal if the defendant had said that it would, if the plaintiff failed to pay the sum of RM3,187,151 sell the said land and recoup its loss and refund the balance to the plaintiff. In its submission the defence takes the point that the subsequent two letters were indeed a compromise or a settlement agreement and that the parties had agreed to revert to *status quo.* But was it reverting to *status quo*? As I see it the last condition in the letter dated 26 April 1989 stated that in the event the plaintiff failed to refund the full sum of RM3,186,999 within the stipulated time the defendant was to take over the said land and the plaintiff would not have any claim over it at all.

In the circumstances, I have no hesitation in holding that the JVA still subsists. Since specific performance would seem futile in the light of the defendant's own admission of the non-viability of the project, I hereby award the plaintiff the alternative prayer of damages to be assessed by the deputy registrar. Costs of this action to the plaintiff.